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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 CELEBRITY CHEFS TOUR, LLC,  
12 a California limited liability company;  
13 and PROMARK PRODUCTIONS,  
14 LLC, a California limited liability  
15 company,

16 Plaintiffs,

17 vs.

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19  
20 MACY'S, INC, a Delaware  
21 corporation; WHIRLPOOL  
22 CORPORATION, a Delaware  
23 corporation; LEC MEDIA, LLC,  
24 an Illinois limited liability company;  
25 EXECUTIVE PROGRAM  
26 SERVICES, INC., a Washington  
27 corporation; JACK O'DONNELL,  
28 an individual; SCOTT DUMMLER,  
an individual; DEVIN ALEXANDER,  
INC, a California corporation; DEVIN  
ALEXANDER, a.k.a. RENEE  
SIMONE, an individual; and DOES  
1-10, inclusive,

Defendants.

CASE NO. 13-CV-2714 JLS (KSC)

**ORDER: (1) GRANTING  
DEFENDANTS DEVIN  
ALEXANDER AND DEVIN  
ALEXANDER, INC.'S REQUEST  
FOR JUDICIAL NOTICE;  
(2) GRANTING PLAINTIFFS'  
REQUEST FOR JUDICIAL  
NOTICE; AND (3) GRANTING IN  
PART AND DENYING IN PART  
DEFENDANTS DEVIN  
ALEXANDER AND DEVIN  
ALEXANDER, INC.'S MOTION  
TO DISMISS PLAINTIFFS'  
COMPLAINT PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(6)**

(ECF Nos. 15, 36)

Presently before the Court is Defendants Devin Alexander, a.k.a. Renee Simone (“Alexander”), and Devin Alexander, Inc.’s (“DAI,” and, collectively, “Alexander Defendants”) Motion to Dismiss (“MTD”) Plaintiffs Celebrity Chefs Tour, LLC (“CCT”) and Promark Productions, LLC’s (“Promark,” and, collectively, “Plaintiffs”) Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 15.) Also before the Court are Alexander Defendants’ Request for Judicial Notice (“RJN”) (ECF No. 15-2), Plaintiffs’ RJN (ECF No. 36), and Plaintiffs’ Response in Opposition to (ECF No. 40) and Alexander Defendants’ Reply in Support of (ECF No. 42-1) the Motion. The hearing for the Motion was vacated and the matter taken under submission without oral argument pursuant to Civil Local Rule 7.1.d.1. (ECF No. 54.) Having considered the parties’ arguments and the law, the Court **GRANTS** both Alexander Defendants’ and Plaintiffs’ RJNs and **GRANTS IN PART AND DENIES IN PART** Alexander Defendants’ MTD.

### BACKGROUND

Plaintiffs, both California limited liability companies, are the producer of a live tour (“the Tour”) and a television series filmed on the Tour called “The Great American Chef’s Tour” (“GACT,” or, “the Show”). (Compl. ¶¶ 1, 2, 13, ECF No. 1.) Plaintiffs allegedly created the concept for GACT in 2008 and own all of the copyrights for GACT. (*Id.* ¶ 14.) Plaintiffs also own the trademark and service mark for GACT. (*Id.* ¶ 16.)

In August 2011, Plaintiffs and Window to the World Communications, Inc. (“WTTW”)—“a leading public television station and producer and distributor of content to public television stations nationwide”—entered into a contract whereby WTTW was to present and distribute twenty-six (26) episodes of GACT, to begin airing in the spring of 2012. (*Id.* ¶¶ 17, 22.) The first pilot generated generally positive feedback. (*Id.* ¶ 21.) Thereafter, Plaintiffs began soliciting potential sponsors for the Tour and GACT, including Macy’s, Inc. (“Macy’s”), a Delaware Corporation. (*Id.* ¶¶ 25, 3.)

1 In October 2011, Plaintiffs contacted Alexander about auditioning as the host of  
2 GACT. (*Id.* ¶ 47.) Alexander is a resident of Los Angeles who owns DAI, a California  
3 corporation. (*Id.* ¶¶ 9–10.) Alexander expressed her interest in the role. (*Id.*) All other  
4 parties involved in GACT were pleased to have Alexander serve as the host. (*Id.*)

5 In October and November 2011, Plaintiffs presented the GACT concept to Stacy  
6 Rosenthal (“Rosenthal”), Macy’s director of special events, and her superiors Amy  
7 Kuhl (“Kuhl”) and Martine Reardon (“Reardon”). (*Id.* ¶¶ 26–28.) Plaintiffs agreed to  
8 certain accommodations, including altering their schedule to accommodate Macy’s  
9 needs and incorporating Macy’s name as the title sponsor of the Tour. (*Id.* ¶ 28.)  
10 Macy’s was cautioned that Federal Communications Commission (“FCC”) laws and  
11 regulations, however, would not permit its name to appear in the TV show. (*Id.*) On  
12 November 9, 2011, Rosenthal and Kelly Lainsbury (“Lainsbury”) informed Plaintiffs  
13 that Macy’s had approved a \$500,000 sponsorship. (*Id.* ¶ 30.)

14 On January 6, 2012, Rosenthal requested, and Plaintiffs sent, a copy of the Tour  
15 schedule and a purchase order for the Macy’s sponsorship (“the Purchase Order,” or,  
16 “the Macy’s Contract”). (*Id.* ¶ 34.) On February 22, 2012, Macy’s approved the  
17 Purchase Order and requested an invoice for a first payment of \$100,000. (*Id.* ¶ 35.)

18 Macy’s had previously asked Plaintiffs if it could present its potential  
19 involvement to other companies, and Plaintiffs had agreed. (*Id.* ¶ 33.) On March 14,  
20 2012, Rosenthal informed Plaintiffs that Macy’s had entered into an agreement with  
21 Whirlpool Corporation (“Whirlpool”), a Delaware corporation, which would be a  
22 promotional partner of Macy’s, but not Plaintiffs. (*Id.* ¶ 38.)

23 On April 14, 2012, Plaintiffs received a signed contract from Alexander (“the  
24 Alexander Contract”), who had agreed to host GACT. (*Id.* ¶ 47.) On April 16, 2012,  
25 Plaintiffs staged a live event that provided the footage for the second pilot of GACT,  
26 with Alexander as the host. (*Id.* ¶ 42.) The same day, Plaintiffs signed and returned to  
27 Macy’s the Purchase Order. (*Id.* ¶ 43.) Rosenthal acknowledged receipt of the signed  
28 Purchase Order and informed Plaintiffs that “she would have Kuhl sign it as soon as

1 possible.” (*Id.*)

2 On April 19, 2012, Plaintiffs contacted LEC Media, LLC (“LEC”), an Illinois  
3 limited liability company, and Scott Dummler (“Dummler”), an Illinois resident and  
4 LEC executive, to “discuss[] the possibility of hiring them to do the editing of Pilot No.  
5 2 and to and do [*sic*] the filming of the Tour as well as the possible post-production  
6 work on [GACT].” (*Id.* ¶¶ 5, 8, 48.) In or about April 2012, the parties allegedly  
7 reached an agreement, never reduced to a formal written contract, whereby LEC would  
8 be the independent contractor editor of Pilot No. 2 and the independent contractor  
9 production company for the filming of the Tour. (*Id.*) Plaintiffs allege that there was  
10 a mutual understanding that all intellectual property was to remain Plaintiffs’ exclusive  
11 property. (*Id.*)

12 On April 26, 2012, Plaintiffs received Macy’s first \$100,000 sponsorship  
13 payment. (*Id.* ¶ 45.) On May 4, 2012, Lainsbury informed Plaintiffs that Kuhl was  
14 insisting that chefs associated with Macy’s be included at each Tour stop, and that the  
15 Tour events be held in Macy’s stores whenever possible. (*Id.* ¶ 49.) Plaintiffs  
16 explained that FCC laws and regulations would not permit Macy’s to have editorial  
17 control over content. (*Id.*) Lainsbury cautioned Plaintiffs that they should “never say  
18 no to” Kuhl, who was “used to getting her way.” (*Id.*)

19 On May 8, 2012, Plaintiffs met with Dummler and representatives of WTTW to  
20 discuss the show and some of the problems Plaintiffs were having with Macy’s. (*Id.*  
21 ¶ 50.) Dummler acknowledged that he and LEC would ensure that Macy’s specifically  
22 and GACT generally remained in compliance with the applicable laws. (*Id.*)

23 The Tour was scheduled to begin in Seattle on May 30, 2012, and to end in  
24 Chicago in mid-July. (*Id.* ¶ 51.) Throughout May, Plaintiffs contacted Macy’s, without  
25 much success, “about the need to confirm Tour venues, cities, chefs and other  
26 arrangements.” (*Id.*) On May 13, 2012, Plaintiffs sent Macy’s its second \$100,000  
27 invoice. (*Id.* ¶ 52.)

28 On May 17, 2012, Plaintiffs learned that Macy’s had created the logo “Macy’s

1 Great American Chef's Tour," and warned Macy's that Plaintiffs owned the GACT  
2 trademark and that the logo Macy's designed would not be used on the Tour or in the  
3 show. (*Id.* ¶ 53.) On May 18, 2012, Plaintiffs spoke to Rosenthal, who confided that  
4 she was thinking about quitting Macy's because Kuhl was "intolerable." (*Id.* ¶ 54.)  
5 Rosenthal purportedly warned Plaintiffs that Kuhl was scheming to take control, and  
6 possibly ownership, of GACT. (*Id.*)

7 On May 21, 2012, Plaintiffs were informed that Rosenthal had quit and that Jodi  
8 Riddick ("Riddick"), Rosenthal's former assistant, would be taking over her position.  
9 (*Id.* ¶ 56.) Plaintiffs worked with Whirlpool, at Macy's request, to make changes to the  
10 stage kitchen to include Whirlpool appliances. (*Id.* ¶ 57.) Whirlpool was informed that  
11 it could not be a sponsor because its appliances would be visible. (*Id.*)

12 On May 22, 2012, Kuhl called Plaintiffs and accused them of changing their deal  
13 with Macy's and insisted on having Macy's name appear on the Tour and in the show,  
14 leading Plaintiffs to threaten to cancel the Tour. (*Id.* ¶ 58.) Later that same day,  
15 Riddick called and told Plaintiffs that Macy's would comply with its agreement and all  
16 applicable laws, and that Macy's would send the second sponsorship payment  
17 immediately. (*Id.* ¶ 59.) Yet, on May 30, 2012, Plaintiffs learned that Macy's had  
18 issued a national press released touting "Macy's Great American Chefs Tour." (*Id.* ¶  
19 60.) Nonetheless, the Tour commenced as scheduled, with eight (8) events resulting in  
20 the filming of fourteen (14) episodes of GACT between May 30, 2012 and June 10,  
21 2012. (*Id.* ¶ 61.) During this time, however, Plaintiffs' problems with Macy's  
22 continued. (*Id.*)

23 On June 10, 2012, Plaintiffs sent Macy's the third sponsorship invoice. (*Id.* ¶  
24 63.) On June 15, 2012, Kuhl called Plaintiffs and threatened to pull out of the  
25 sponsorship unless Plaintiffs agreed to comply with her demands. (*Id.* ¶ 65.) Plaintiffs  
26 stated that they would, "within the limits permitted by the Governing Laws,"  
27 accommodate her requests, but threatened to suspend the Tour if Macy's did not make  
28 its second and third payments and return the signed Purchase Order. (*Id.*) Kuhl told

1 Plaintiffs that she would send the documents by overnight delivery. (*Id.*) However, the  
2 draft version of the Purchase Order that Plaintiffs received later that day “contained  
3 multiple revisions.” (*Id.*) The second sponsorship payment arrived the following day,  
4 unaccompanied by a signed Purchase Order. (*Id.* ¶ 66.)

5 Through June and July 2012, Plaintiffs negotiated with Macy’s in an attempt to  
6 retain it as a sponsor. (*Id.* ¶ 69.) On June 20, 2012, Plaintiffs provided an amended  
7 Purchase Order, which Kuhl refused to sign. (*Id.* ¶ 70.) That same day, Plaintiffs sent  
8 Macy’s a notice of material breach of the April 16, 2012 Purchase Order. (*Id.* ¶ 71.)

9 On June 21, 2012, Plaintiffs informed LEC, Jack O’Donnell  
10 (“O’Donnell”)—LEC’s president and CEO—and Dummler that the Tour was  
11 suspended until Macy’s tendered its sponsorship payments or until Plaintiffs could find  
12 a new sponsor. (*Id.* ¶ 74.) LEC, O’Donnell, and Dummler purportedly urged Plaintiffs  
13 to continue the tour and expressed that they would be able to get Macy’s to fulfill its  
14 contractual obligations. (*Id.*) Plaintiffs continued the Tour for two more stops, but on  
15 June 25, 2012, having not received payment from Macy’s, Plaintiffs suspended the  
16 Tour. (*Id.* ¶ 75.) Subsequently, Plaintiffs sent the “sets, set decorations, equipment,  
17 appliances, hardware, and other materials used in the production of the Tour and the TV  
18 Show” (“the CCT Assets”) to LEC, which LEC told Plaintiffs it would hold  
19 “temporarily until it could be determined where they should be sent.” (*Id.*)

20 In July 2012, Macy’s continued with some of the cancelled tour events under the  
21 name “Macy’s Great American Chefs Tour.” (*Id.* ¶ 76.) In December 2012, Plaintiffs  
22 heard from several chefs who had appeared on the Tour that several episodes of GACT  
23 had already begun to air. (*Id.* ¶ 79.) Thereafter, Plaintiffs learned that on November  
24 24, 2012, Macy’s released a press release announcing a thirteen (13)-episode season of  
25 “Macy’s Great American Chefs Tour.” (*Id.* ¶ 80.) Plaintiffs also learned that  
26 Alexander had been promoting “her new show,” which promotions included  
27 photographs and videos shot during the Tour. (*Id.* ¶ 81.) Further, Plaintiffs confirmed  
28 that several public broadcasting stations had already aired episodes of GACT. (*Id.* ¶



1 82.) These stations informed Plaintiffs that they had received GACT from Executive  
2 Program Services, Inc. (“EPS”). (*Id.* ¶ 83.)

3 Plaintiffs contacted EPS, which confirmed that it had contracted with LEC to  
4 distribute GACT. (*Id.* ¶ 84.) EPS informed Plaintiffs that it had known that Plaintiffs  
5 owned GACT and that it had insisted on obtaining an indemnification agreement from  
6 LEC before agreeing to distribute the Show. (*Id.*)

7 Plaintiffs allege that LEC, Dummler, and O’Donnell contacted various television  
8 stations to get them to air GACT, and that they misrepresented to these stations that  
9 they, Macy’s, and Whirlpool—and not Plaintiffs—produced and owned GACT. (*Id.*  
10 ¶ 85.) In an attempt to disguise this deception, Plaintiffs allege that Defendants have  
11 at times referred to GACT by the name “America’s Chefs On Tour,” or other, similar  
12 names. (*Id.* ¶ 86.)

13 On January 3, 2013, Plaintiffs demanded that Defendants cease and desist from  
14 using Plaintiffs’ intellectual property. (*Id.* ¶ 87.) Plaintiffs have also requested that  
15 LEC relinquish custody of the CCT Assets, but without success. (*Id.* ¶ 77.)  
16 Accordingly, on June 19, 2013, Plaintiffs instituted this action in the U.S. District Court  
17 for the Central District of California. (*See generally* Compl., ECF No. 1.) On  
18 September 3, 2013, Defendants filed motions to dismiss for improper venue pursuant  
19 to Federal Rule of Civil Procedure 12(b)(3). (ECF Nos. 10–14.) On the same day,  
20 Defendants filed motions to dismiss the case for lack of personal jurisdiction or failure  
21 to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6),  
22 respectively. (ECF Nos. 15–21.)

23 On November 4, 2013, Judge John A. Kronstadt held a hearing on Defendants’  
24 motions. (ECF No. 49.) On November 12, 2013, Judge Kronstadt granted Defendants’  
25 Rule 12(b)(3) motions and transferred the case to this District. (Order 11, ECF No. 50.)  
26 Subsequently, this Court reinstated Defendants’ Rule 12(b)(2) and 12(b)(6) motions and  
27 took the matters under submission. (ECF No. 54.)

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## REQUESTS FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” “Judicially noticed facts often consist of matters of public record.” *Botelho v. U.S. Bank, N.A.*, 692 F. Supp. 2d 1174, 1178 (N.D. Cal. 2010) (citations omitted); *see also W. Fed. Sav. & Loan Ass’n v. Heflin Corp.*, 797 F. Supp. 790, 792 (N.D. Cal. 1992). While “a court may take judicial notice of the existence of matters of public record, such as a prior order or decision,” it should not take notice of “the truth of the facts cited therein.” *Marsh v. Cnty. of San Diego*, 432 F. Supp. 2d 1035, 1043 (S.D. Cal. 2006).

Alexander Defendants ask the Court to judicially notice the following seven (7) documents, all filed in the action *Celebrity Chefs Tour LLC v. LEC Media, LLC, et al.*, Case No. 37-2012-00085275-CU-BC-CTL, Superior Court of the State of California, County of San Diego: (1) Plaintiff’s Complaint, filed on November 13, 2012; (2) Plaintiff’s First Amended Complaint (Verified), filed on January 8, 2013; (3) Declaration of Scott Dummmler in Opposition to Plaintiffs’ *Ex Parte* Motion for Temporary Restraining Order, filed on November 27, 2012; (4) Register of Actions Docket; (5) Minute Order on Plaintiffs’ *Ex Parte* Application for Temporary Restraining Order, filed on November 27, 2012; (6) Minute Order on Plaintiffs’ *Ex Parte* Application for Temporary Restraining Order, filed on January 10, 2013; and (7) Minute Order on Plaintiffs’ *Ex Parte* Application for Temporary Restraining Order, filed on January 31, 2013. Alexander Defendants also ask the Court to judicially notice the following four (4) documents, all filed with the United States Patent and Trademark Office: (1) Trademark/Service Mark Application for “Great American Chefs Tour,” Serial No. 85284912, filed on April 4, 2011; (2) Office Action regarding Trademark Application Serial No. 85284912; (3) Response to Office Action regarding Trademark Application Serial No. 85284912; and (4) Trademark Registration No. 4,145,234,



1 registered May 22, 2012.

2 Plaintiffs ask the Court to judicially notice the following four (4) documents, all  
 3 filed in the action *Celebrity Chefs Tour LLC v. LEC Media, LLC, et al.*, Case No. 37-  
 4 2012-00085275-CU-BC-CTL, Superior Court of the State of California, County of San  
 5 Diego: (1) Declaration of Scott Dummier in Opposition to Plaintiffs' *Ex Parte* Motion  
 6 for Temporary Restraining Order, filed on November 27, 2012; (2) Supplemental  
 7 Declaration of Gary Ravet in Support of Plaintiffs' *Ex Parte* Motion for Temporary  
 8 Restraining Order, filed December 4, 2012; (3) Declaration of Brian J. Dunn in Support  
 9 of Plaintiffs' *Ex Parte* Motion for Temporary Restraining Order, filed January 30, 2013;  
 10 and (4) Reporter's Transcript of January 10, 2013 Hearing.

11 All of these documents are available to the public and are certified and  
 12 maintained by an official office. Their accuracy cannot therefore be reasonably  
 13 disputed. Accordingly, the Court **GRANTS** Alexander Defendants' RJN as to all  
 14 eleven (11) documents and **GRANTS** Plaintiffs' RJN as to all four (4) documents.  
 15 However, the Court does not take notice of the truth of the facts asserted therein.

## 16 **MOTION TO DISMISS**

### 17 **I. Legal Standard**

18 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the  
 19 defense that the complaint "fail[s] to state a claim upon which relief can be granted,"  
 20 generally referred to as a motion to dismiss. The Court evaluates whether a complaint  
 21 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil  
 22 Procedure 8(a), which requires a "short and plain statement of the claim showing that  
 23 the pleader is entitled to relief." Although Rule 8 "does not require 'detailed factual  
 24 allegations,' . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-  
 25 harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
 26 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's obligation  
 27 to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and  
 28 conclusions, and a formulaic recitation of the elements of a cause of action will not do."

1 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor  
 2 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
 3 enhancement.’” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

4 “To survive a motion to dismiss, a complaint must contain sufficient factual  
 5 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*  
 6 (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is  
 7 facially plausible when the facts pled “allow[] the court to draw the reasonable  
 8 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*,  
 9 550 U.S. at 556). That is not to say that the claim must be probable, but there must be  
 10 “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Facts  
 11 “‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to  
 12 relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as  
 13 true “legal conclusions” contained in the complaint. *Id.* This review requires context-  
 14 specific analysis involving the Court’s “judicial experience and common sense.” *Id.* at  
 15 679 (citation omitted). “[W]here the well-pleaded facts do not permit the court to infer  
 16 more than the mere possibility of misconduct, the complaint has alleged—but it has not  
 17 ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

18 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless  
 19 the court determines that the allegation of other facts consistent with the challenged  
 20 pleading could not possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*,  
 21 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well*  
 22 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to  
 23 amend would be futile, the Court may deny leave to amend.

## 24 **II. Analysis**

25 Plaintiffs assert the following seventeen claims: (1) breach of contract (Macy’s);  
 26 (2) breach of contract (Dummler, LEC, and O’Donnell); (3) breach of contract  
 27 (Alexander); (4) intentional misrepresentation (Alexander, DAI, Dummler, LEC,  
 28 Macy’s, and O’Donnell); (5) negligent misrepresentation (Alexander, DAI, Dummler,

1 LEC, Macy's, and O'Donnell); (6) conversion (all Defendants); (7) trademark  
 2 infringement (all Defendants); (8) false designation of origin (all Defendants); (9)  
 3 trademark dilution (all Defendants); (10) common law unfair competition (all  
 4 Defendants); (11) unfair competition in violation of California Business and Professions  
 5 Code § 17200 (all Defendants); (12) misappropriation of ideas (all Defendants); (13)  
 6 intentional interference with contractual relations (EPS, Dummler, LEC, Macy's,  
 7 O'Donnell, and Whirlpool); (14) intentional interference with prospective economic  
 8 advantage (EPS, Dummler, LEC, Macy's, O'Donnell, and Whirlpool); (15) negligent  
 9 interference with contractual relations (EPS, Dummler, LEC, Macy's, O'Donnell, and  
 10 Whirlpool); (16) negligent interference with prospective economic advantage (EPS,  
 11 Dummler, LEC, Macy's, O'Donnell, and Whirlpool); and (17) declaratory relief (EPS,  
 12 LEC, Macy's, and Whirlpool). The Court addresses each in turn.

13 **A. Request for Punitive Damages**

14 As a preliminary matter, Alexander Defendants challenge Plaintiffs'  
 15 "generalized" claims for punitive damages. (MTD 20, ECF No. 15-1.) The Court,  
 16 however, declines to rule on the propriety of Plaintiffs' requests for punitive damages,  
 17 because a Rule 12(b)(6) motion is the improper vehicle for raising this argument.  
 18 Rather, Alexander Defendants should have addressed this issue in a Rule 12(f) motion  
 19 to strike. *See, e.g., Rodriguez v. JP Morgan Chase & Co.*, 809 F. Supp. 2d 1291, 1300  
 20 (S.D. Cal. 2011); *Clark v. Allstate Ins. Co.*, 106 F. Supp. 2d 1016 (S.D. Cal. 2000);  
 21 *Clement v. Am. Greetings Corp.*, 636 F. Supp. 1326, 1332, 1333–34 (S.D. Cal. 1986).

22 **B. Claim 3: Breach of Contract**

23 Alexander Defendants first argue that Promark<sup>1</sup> has not alleged, and cannot,  
 24 performance of its obligations under the Alexander Contract. Alexander Defendants  
 25

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26 <sup>1</sup> Alexander Defendants note that CCT was not a party to the Alexander Contract.  
 27 (MTD 9 n.3, ECF No. 15-1.) Because Plaintiffs attached the Alexander Contract as Exhibit  
 28 3 to their Complaint, the Court may properly consider it in ruling on this MTD. *See Coto*  
*Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (citations omitted). On its face,  
 the Alexander Contract is only between Alexander Defendants and Promark. Accordingly, the  
 MTD is **GRANTED WITHOUT PREJUDICE** for this claim as to CCT.

1 note that Promark claims to have performed all of its obligations under the Macy's  
 2 Contract rather than the Alexander Contract. (MTD 9–10, ECF No. 15-1 (citing Compl.  
 3 ¶ 101, ECF No. 1).) Promark argues that this is a mere typographical error and that it  
 4 has alleged a breach of the *Macy's Contract*—another apparent typographical error.  
 5 (Pls.' Resp. in Opp'n 8–9, ECF No. 40.) No doubt this is a typographical error, but the  
 6 fact remains that Promark has failed to allege performance under the Alexander  
 7 Contract anywhere in the Complaint. Accordingly, as to Promark, Alexander  
 8 Defendants' MTD is **GRANTED WITHOUT PREJUDICE** as to this claim.

9 **C. Claims 4 & 5: Intentional and Negligent Misrepresentation**

10 The elements of a claim for intentional misrepresentation are: “(1) a  
 11 misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge  
 12 of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable  
 13 reliance; and (5) resulting damage.” *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d  
 14 268, 274 (Cal. 2004) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)). To  
 15 allege a claim for negligent misrepresentation, a plaintiff must plead: “(1) the  
 16 misrepresentation of a past or existing material fact, (2) without reasonable ground for  
 17 believing it to be true, (3) with intent to induce another's reliance on the fact  
 18 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting  
 19 damage.” *Wells Fargo Bank, N.A. v. FSI, Fin. Solutions, Inc.*, 196 Cal. App. 4th 1559,  
 20 1573 (2011) (citation and internal quotation marks omitted).

21 Because a claim for misrepresentation sounds in fraud, the heightened pleading  
 22 standards of Federal Rule of Civil Procedure 9(b) apply. For misrepresentation claims,  
 23 this standard is met when a party specifies the time, place and specific content of the  
 24 alleged fraudulent representation; the identity of the person engaged in the fraud; and  
 25 “the circumstances indicating falseness” or “the manner in which [the]  
 26 representations were false and misleading.” *Genna v. Digital Link Corp.*, 25 F. Supp.  
 27 2d 1032, 1038 (N.D. Cal. 1997) (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541,  
 28 1547–48 (9th Cir. 1994)). However, “[m]alice, intent, knowledge, and other conditions

of a person's mind may be alleged generally.” Fed. R. Civ. P. 9(b). But, where multiple defendants are accused of fraud, the claim “must inform each defendant of his alleged participation in the fraud.” *Rincon v. Recontrust Co.*, No. 09cv937-IEG-JMA, 2009 WL 2407396, at \*3 (S.D. Cal. Aug 4, 2009) (quoting *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987)). Moreover, merely attributing a misrepresentation to a corporate entity is inadequate; a specific person must be named, or at least identified. *See Kriendler v. Chem. Waste Mgmt., Inc.*, 877 F. Supp. 1140, 1155 (N.D. Ill. 1995).

Alexander Defendants argue that Plaintiffs' misrepresentation claims fail because they do not identify the alleged representation, nor do they allege any of the other elements of these claims with the requisite level of specificity. (MTD 11–12, ECF No. 15-1.) Plaintiffs counter that they adequately allege Alexander Defendants' fraud by stating that Alexander mailed them the signed Alexander Contract on April 14, 2012, because they have impliedly alleged that “Alexander in fact intended to align herself with Defendants Macy's and Whirlpool and to host and promote their show.” (Pls.' Resp. in Opp'n 9, ECF No. 40 (emphasis in original).)

The Court agrees with Alexander Defendants that Plaintiffs' allegations are insufficient to state a claim. Plaintiffs generally allege that Defendants, except Whirlpool, “knowingly made false statements” as alleged above. (Compl. ¶¶ 105, 112, 113, ECF No. 1.) Plaintiffs state that these false statements include:

inducing [Plaintiffs] to proceed with the Tour and taping of the TV Show and allowing them to retain temporary possession of the CCT Assets, while their intention was to take the CCT Assets and use them for their own benefit and to attempt to steal the intellectual property and other rights and interests of [Plaintiffs] for their own profit.

(*Id.* ¶ 105.) However, Plaintiffs fail to specify what Alexander Defendants did, and when, to induce Plaintiffs' actions in this regard. Plaintiffs make no allegations in the Complaint that Alexander was in any way involved in the alleged misappropriation of the CCT Assets, nor do they suggest that Alexander intended to defraud Plaintiffs at the time she signed her contract. (*See, e.g., id.* ¶¶ 47, 75, 77–78.) Accordingly, Plaintiffs

1 fail to allege with specificity Alexander Defendants' misrepresentations, and thus  
 2 Alexander Defendants' MTD is **GRANTED WITHOUT PREJUDICE** as to these  
 3 claims.

4 **D. Claim 6: Conversion**

5 Alexander Defendants next argue that Plaintiffs' conversion claim fails because  
 6 Plaintiffs fail to allege Alexander Defendants' possession of the CCT Assets at any  
 7 time. (MTD 12, ECF No. 15-1.) Plaintiffs argue that they properly allege a conversion  
 8 claim because "[a]n action for conversion lies not only in the taking of another's  
 9 property, but also in the use of that property," and Alexander Defendants converted  
 10 Plaintiffs' property when Alexander used the CCT Assets for her own benefit, including  
 11 promoting GACT and posting GACT footage on Alexander's website. (Pls.' Resp. in  
 12 Opp'n 10, ECF No. 40.)

13 The Court agrees with Plaintiffs that they have pleaded a claim for conversion.  
 14 The elements of a claim for conversion consist of (1) ownership or a right to possession,  
 15 (2) wrongful disposition of the property, and (3) damages. *G. S. Rasmussen & Assocs.,*  
 16 *Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992). Moreover, § 229  
 17 of the Restatement (Second) of Torts provides:

18 One who receives possession of a chattel from another with the intent to  
 19 acquire for himself or for a third person a proprietary interest in the  
 20 chattel which the other has not the power to transfer is subject to liability  
 for conversion to a third person then entitled to the immediate possession  
 of the chattel.

21 California Courts have cited approvingly to § 229. *See, e.g., Moore v. Regents of Univ.*  
 22 *of Cal.*, 51 Cal. 3d 120, 157 n.4 (1990); *Strutt v. Ontario Sav. & Loan Ass'n*, 28 Cal.  
 23 App. 3d 866, 874–75 (1972).

24 Plaintiffs repeatedly assert their ownership of the GACT copyright, trademark,  
 25 and content. (Compl. ¶¶ 14–16, 28, 48, 118, ECF No. 1.) Plaintiffs purportedly  
 26 "consented to LEC holding the CCT Assets temporarily until it could be determined  
 27 where they should be sent." (*Id.* ¶ 75.) Plaintiffs have since requested the return of the  
 28 CCT Assets. (*Id.* ¶ 77.) Yet, the assets have not been returned. (*Id.*) Rather, Plaintiffs



1 allege that, as of December 2012, Alexander had been, for several months, promoting  
 2 “her ‘new show’—which is the ‘Great American Chefs Tour’—”by posting  
 3 photographs and videos, “all shot during the Tour,” on her website and Facebook page.  
 4 (*Id.* ¶ 81.) Thus, Plaintiffs had a right to immediate possession of the CCT Assets,  
 5 including the Tour footage. LEC had possession of the CCT Assets, but not the power  
 6 to transfer them. And Alexander appears to have acquired the Tour footage from LEC  
 7 with the intent to make it her own, as she deemed the footage to be from “her” show.  
 8 That Alexander may not have ever possessed the physical tapes is of no consequence,  
 9 as she did gain possession of the intellectual property contained therein.<sup>2</sup>

10 Alexander Defendants also contend, however, that the claim must be dismissed  
 11 because Plaintiffs improperly seek compensatory damages rather than the damages for  
 12 conversion mandated by California Civil Code § 3336. (MTD 12–13, ECF No. 15-1  
 13 (citing Compl. ¶¶ 122–23, ECF No. 1).) However, Plaintiffs allege that they “ha[ve]  
 14 been damaged” from their loss of the CCT Assets and their inability to distribute GACT  
 15 themselves, which is all that is required on a motion to dismiss. (Compl. ¶¶ 102, 122,  
 16 ECF No. 1.) *See Summit Tech., Inc. v. High-Line Med. Instruments, Co.*, 933 F. Supp.  
 17 918, 927–28 (C.D. Cal. July 16, 1996) (citation, alteration, and internal quotation marks  
 18 omitted) (“[A] Rule 12(b)(6) motion will not be granted merely because a plaintiff  
 19 requests a remedy to which he or she is not entitled.”) Accordingly, Plaintiffs have  
 20 stated a prima facie claim for conversion, and Alexander Defendants’ MTD must be  
 21 **DENIED** as to this claim.

22 ***E. Claims 7 & 8: Trademark Infringement and False Designation of Origin***

23 To state a claim for federal trademark infringement under the Lanham Act, a  
 24 plaintiff must show: “(1) that it has a protectible ownership interest in the mark; and  
 25

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26 <sup>2</sup> “In short, California does not follow the *Restatement*’s strict requirement that some  
 27 document must actually represent the owner’s intangible property right. On the contrary,  
 28 courts routinely apply the tort [of conversion] to intangibles without inquiring whether they  
 are merged in a document.” *Kremen v. Cohen*, 337 F.3d 1024, 1033 (9th Cir. 2002)  
 (explaining that California jurisprudence “recognizes conversion of music recordings, radio  
 shows, customer lists, regulatory filings, confidential information and even domain names”).

(2) that the defendant’s use of the mark is likely to cause consumer confusion.”  
*Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (citation omitted). A claim for false designation of origin is subject to “[t]he same standard,” except a claim for false designation of origin does not require that the mark be registered. *See Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046 n.6 (9th Cir. 1999) (citing 15 U.S.C. §§ 1114(1) (trademark infringement), 1125(a)(1) (false designation of origin)). Accordingly, the Court analyzes these claims jointly.

As to the first element, Alexander Defendants argue that judicially noticeable records establish that only CCT owns the GACT trademark. (MTD 13 n.4, ECF No. 15-1 (citing RJN Exs. 8–11, ECF No. 15-6).) Alexander Defendants, however, are mistaken. The documents at issue are from June 2011 through May 2012. Thus, it is possible that CCT assigned the GACT mark to Promark sometime after May 22, 2012 but prior to or during the acts comprising Plaintiffs’ allegations. Thus, the Court declines at this time to dismiss the trademark claims against Promark on this basis. Plaintiffs allege ownership of the mark as to both Promark and CCT, and thus Plaintiffs have sufficiently alleged the first element of their trademark infringement claim. (*See* Compl. ¶¶ 16, 125, ECF No. 1.)

As to the second element, Alexander Defendants argue that Plaintiffs fail to allege “that Alexander is using a trademark, let alone using CCT’s trademark or a colorable imitation of CCT’s mark on goods in commerce without CCT’s consent or that such use is likely to cause confusion, mistake or deceive the public.” (MTD 13–14, 14–15, ECF No. 15-1.) The Court disagrees. When evaluating likelihood of confusion on a motion to dismiss, “[i]f the court determines as a matter of law from the pleadings that the goods are unrelated and confusion is unlikely, the complaint should be dismissed.” *Murray v. Cable Nat’l Broad. Co.*, 86 F.3d 858, 860 (9th Cir. 1996) (citing *Toho Co. Ltd. v. Sears, Roebuck & Co.*, 645 F.2d 788, 790–91 (9th Cir. 1981)). But, while likelihood of confusion *can* be decided as a matter of law, “[w]hether confusion

1 is likely is a factual determination woven into the law” that courts “routinely treat . . .  
 2 as [an issue] of fact” best left for determination by a jury. *Levi Strauss & Co. v. Blue*  
 3 *Bell, Inc.*, 778 F.2d 1352, 1356, 1356 n.5 (9th Cir. 1985).

4 It does not appear as a matter of law that consumer confusion is unlikely.  
 5 Plaintiffs allege that “Defendants have used and are using [Plaintiffs’] registered mark.”  
 6 (Compl. ¶ 126, ECF No. 1.) Plaintiffs claim that Defendants are using the mark in  
 7 commerce, “in connection with the distribution[] and/or advertising of a television  
 8 show.” (*Id.*) More specifically, Plaintiffs allege that “Alexander has been promoting  
 9 her ‘new show’—which is the ‘Great American Chefs Tour’—on her web site and on  
 10 her Facebook page,” and that these promotions have included the infringing name. (*Id.*  
 11 ¶ 81; Pls.’ Resp. in Opp’n 11, ECF No. 40.) Plaintiffs claim that Alexander  
 12 Defendants’ use of the mark is without Plaintiffs’ consent. (Compl. ¶ 126, ECF No. 1.)  
 13 And, Plaintiffs allege that the use of the mark is likely to confuse consumers. (*Id.*) This  
 14 seems particularly true given that the goods are so similar—indeed, Plaintiffs claim that  
 15 Defendants are really marketing Plaintiffs’ television show as Defendants’ own. (*Id.*  
 16 ¶¶ 79–87.) Accordingly, the Court finds that Plaintiffs have satisfactorily alleged  
 17 federal trademark infringement and false designation of origin claims and **DENIES**  
 18 Alexander Defendant’s MTD as to these claims.

19 ***F. Claim 9: Trademark Dilution***

20 To plead a claim for federal trademark dilution, a plaintiff must show that it owns  
 21 a famous and distinctive trademark, that the defendant began using the mark in  
 22 commerce after the mark became famous, and that the defendant’s use of the mark is  
 23 likely to cause dilution by blurring or tarnishment. *Visa Int’l Serv. Ass’n v. JSL Corp.*,  
 24 610 F.3d 1088, 1089–90 (9th Cir. 2010) (citing *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d  
 25 628, 634 (9th Cir. 2007)); *see also* 15 U.S.C. § 1125(c).

26 The parties disagree as to whether Plaintiffs adequately allege a famous mark.  
 27 “A mark is famous if it is widely recognized by the general consuming public of the  
 28 United States as a designation of source of the goods or services of the mark’s owner.”

1 15 U.S.C. § 1125(c)(2)(A). In determining whether a mark is famous, a court may  
 2 consider “all relevant factors,” including: (1) “[t]he duration, extent, and geographic  
 3 reach of advertising and publicity of the mark”; (2) “[t]he amount, volume, and  
 4 geographic extent of sales of goods or services offered under the mark”; (3) “[t]he  
 5 extent of actual recognition of the mark”; and (4) whether the mark is registered. *Id.* §  
 6 1125(c)(2)(A)(i)–(iv). Alexander Defendants urge that Plaintiffs do not allege that a  
 7 large percentage of the general consuming public recognizes the GACT mark, only that  
 8 it was presented to several television stations in 2011 and at a public television industry  
 9 event. (MTD 15–16, ECF No. 15-1.) Plaintiffs counter that Alexander Defendants’  
 10 arguments go to the merits of the case rather than the sufficiency of the Complaint.  
 11 (Pls.’ Resp. in Opp’n 11–12, ECF No. 40.) The Court, however, agrees with Alexander  
 12 Defendants.

13 The Court notes that the GACT mark is federally registered, and thus the fourth  
 14 factor favors a finding of fame. However, Plaintiffs make no allegations about any  
 15 advertising and publicity efforts; Plaintiffs apparently made no sales of any GACT  
 16 content; and Plaintiffs fail to allege any facts concerning *wide-reaching* actual  
 17 recognition of their mark. Plaintiffs allege that their mark was well-received by  
 18 television stations and had a “substantial presence” at the APT Fall Marketplace, which  
 19 appears to have been attended primarily by persons in the entertainment industry.  
 20 (Compl. ¶ 138, ECF No. 1.) Plaintiffs also argue that the show was filmed over the  
 21 course of ten live events in several major cities. (*Id.*) However, these allegations fall  
 22 short of “wide recognition,” and at most suggest that the mark might be famous in the  
 23 insufficient “niche” market of the entertainment industry. *See Planet Coffee Roasters,*  
 24 *Inc. v. Dam*, No. SACV 09-00571-MLG, 2009 WL 2486457, at \*3 (C.D. Cal. Aug. 12,  
 25 2009) (citations omitted). Thus, even applying the relatively lax standard governing  
 26 Rule 12(b)(6) motions, the Court finds that Plaintiffs’ conclusory allegations of fame  
 27 fail to state a “facial[ly] plausib[le]” claim for trademark dilution. *See Iqbal*, 556 U.S.  
 28 at 678. Accordingly, the Court **GRANTS WITHOUT PREJUDICE** Alexander

1 Defendants' MTD as to this claim.

2 **G. Claim 10: Common Law Unfair Competition**

3 "The common law tort of unfair competition is generally thought to be  
4 synonymous with the act of "passing off" one's goods as those of another . . . [, or] acts  
5 analogous to "passing off," such as the sale of confusingly similar products, by which  
6 a person exploits a competitor's reputation in the market.'" *Southland Sod Farms v.*  
7 *Stover Seed Co.*, 108 F.3d 1134, 1147 (9th Cir. 1997), *not followed on other grounds*  
8 *by McKendall v. Crown Control Corp.*, 122 F.3d 803 (1997) (alteration in original)  
9 (quoting *Bank of the W. v. Superior Court*, 2 Cal 4th 1254, 1263 (1992)); *see also*  
10 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008). "The tort  
11 developed as an equitable remedy against the wrongful exploitation of trade names and  
12 common law trademarks that were not otherwise entitled to legal protection." *Bank of*  
13 *the W.*, 2 Cal 4th at 1263 (citation omitted). Thus, "[t]he common law tort of unfair  
14 competition . . . require[s] a showing of competitive injury." *Id.* at 1264 (citations  
15 omitted). "The decisive test of common law unfair competition is whether the public  
16 is likely to be deceived about the source of goods or services by the defendant's  
17 conduct. *Hokto Kinoko Co. v. Concord Farms, Inc.*, 810 F. Supp. 2d 1013, 1032 (C.D.  
18 Cal. 2011) (citations omitted).

19 Alexander Defendants argue that Plaintiffs' claim of common law unfair  
20 competition must be dismissed because Plaintiffs hold a valid, registered trademark.  
21 (See MTD 17, ECF No. 15-1; Reply 8, ECF No. 42-1.) However, courts have routinely  
22 entertained claims for both trademark infringement and common law unfair  
23 competition, implying that the two causes of action are not mutually exclusive,  
24 particularly at the pleading stage. *See, e.g., Hokto Kinoko*, 810 F. Supp. 2d 1013;  
25 *Wecosign, Inc. V. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1079 (C.D. Cal. 2012)  
26 ("[T]he Ninth Circuit 'has consistently held that state common law claims of unfair  
27 competition and actions pursuant to California Business and Professions Code § 17200  
28 are "substantially congruent" to claims under the Lanham Act.' . . . Therefore, the

1 Court jointly analyzes Plaintiff's trademark infringement, false designation of origin,  
 2 state statutory unfair competition, and state common law unfair competition claims.");  
 3 *Moroccanoil, Inc. v. Allstate Beauty Prods., Inc.*, 847 F. Supp. 2d 1197 (C.D. Cal.  
 4 2012); *Vallavista Corp. v. Amazon.com, Inc.*, 657 F. Supp. 2d 1132 (N.D. Cal. 2008);  
 5 *Microsoft Corp. v. Nop*, 549 F. Supp. 2d 1233 (E.D. Cal. 2007); *Area 55, Inc. v.*  
 6 *Pandamerican LLC*, No. 10-CV-269-H (NLS), 2010 WL 3564715 (S.D. Cal. Sept. 10,  
 7 2010); *Mallard Creek Indus., Inc. v. Morgan*, 56 Cal. App. 4th 426 (1997). Thus, the  
 8 Court does not believe that Plaintiffs' common law unfair competition claim is  
 9 precluded as a matter of law. Moreover, because the Court has already determined that  
 10 Plaintiffs have plausibly alleged possible consumer confusion (*see supra* p. 17), the  
 11 Court **DENIES** Alexander Defendants' MTD as to this claim.

12 **H. Claim 11: Violation of California Business and Professions Code § 17200**

13 California's Unfair Competition Law ("UCL") prohibits "any unlawful, unfair  
 14 or fraudulent business act or practice and unfair, deceptive, untrue or misleading  
 15 advertising." Cal. Bus. & Prof. Code § 17200.

16 Alexander Defendants argue that the "general statement that some general acts  
 17 in the 39 pages of facts may constitute unfair competition" is insufficient. (MTD 18,  
 18 ECF No. 15-1.) Accordingly, because

19 Plaintiffs' Complaint does not: (1) allege in what unfair business  
 20 practices Alexander has engaged; (2) allege facts that Alexander was  
 21 involved in monopolistic or anticompetitive practices; (3) identify a  
 22 particular section of the statutory scheme that was violated; (4) describe  
 23 facts supporting a violation; [or] (5) allege facts establishing a causal  
 24 link between defendants' business practices and the alleged harm,

25 Plaintiffs' UCL claim must be dismissed. (*Id.*) Plaintiffs, on the other hand, claim to  
 26 have satisfactorily alleged unfair, unlawful, *and* fraudulent business practices in their  
 27 Complaint. (Pls.' Resp. in Opp'n 13, ECF No. 40.)

28 Plaintiffs argue that, because Alexander Defendants' actions constitute business  
 practices, and because those acts "form the basis of several other claims for relief" in  
 the Complaint, they have satisfactorily alleged unlawful business activities. (*Id.* at 14.)  
 The Court agrees. "An unlawful business activity includes anything that can properly



1 be called a business practice and that at the same time is forbidden by law.” *Blank v.*  
 2 *Kirwan*, 703 P.2d 58, 69 (Cal. 1985) (internal quotation marks omitted) (quoting *People*  
 3 *v. McKale*, 25 Cal. 3d 626, 631–32 (1979)). The act of promoting a television show as  
 4 one’s own is certainly a business practice, and because the Court has found that  
 5 Plaintiffs have plausibly alleged several violations of law, those violations can serve as  
 6 predicate unlawful business activities under the UCL. *See Cel-Tech Commc’ns, Inc. v.*  
 7 *L.A. Cellular Tel. Co.*, 973 P.2d 527, 539–40 (Cal. 1999) (internal quotation marks and  
 8 citations omitted) (“[S]ection 17200 ‘borrows’ violations of other laws and treats them  
 9 as unlawful practices that the unfair competition law makes independently actionable.”).

10 Plaintiffs claim to have pleaded unfair business practices by “alleg[ing] that  
 11 [Plaintiffs] invented, developed, and shot a television show, and that Defendants took  
 12 that television show (including both the concept and the raw footage), made a very  
 13 slight change to its name and then began airing Plaintiff’s *[sic]* footage as a competing  
 14 television show.” (Pls.’ Resp. in Opp’n 13, ECF No. 40.) The Court, however,  
 15 disagrees. Under the UCL, “the word ‘unfair’ . . . means conduct that threatens an  
 16 incipient violation of an antitrust law, or violates the policy or spirit of one of those  
 17 laws because its effects are comparable to or the same as a violation of the law, or  
 18 otherwise significantly threatens or harms competition.” *Cel-Tech Commc’ns*, 973 P.2d  
 19 at 544. Plaintiffs’ allegations, if true, certainly allege unfair acts in a more generalized  
 20 moral sense. *See F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)  
 21 (explaining that “a practice that is neither in violation of the antitrust laws nor deceptive  
 22 [can] nonetheless [be] unfair” if it is “immoral, unethical, oppressive, or  
 23 unscrupulous”). However, Plaintiffs’ allegations fail to allege acts that more narrowly  
 24 violate the spirit of the antitrust laws, such as horizontal price fixing, exclusive dealing,  
 25 or monopolization. *See Holmes & Mangiaracina, Antitrust Law Handbook* § 7:2.  
 26 Accordingly, Plaintiffs do not allege unfair practices within the meaning of the UCL.

27 Finally, Plaintiffs argue that Alexander Defendants have engaged in fraudulent  
 28 business practices by “passing off Plaintiffs’ raw footage as their own show” and

1 promoting the show under a confusingly similar name. (Pls.’ Resp. in Opp’n 14, ECF  
 2 No. 40.) The Court agrees. “The fraud prong of the UCL is unlike common law fraud  
 3 or deception. A violation can be shown even if no one was actually deceived[ or] relied  
 4 upon the fraudulent practice. . . . Instead, it is only necessary to show that members of  
 5 the public are likely to be deceived.” *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144,  
 6 1167 (2000) (internal quotation marks, citations, and alteration omitted). Accepting  
 7 Plaintiffs’ allegations as true, Defendants are actively trying to deceive the public into  
 8 believing that Plaintiffs’ show is instead their own. And, the Court has found that  
 9 Plaintiffs have plausibly alleged possible consumer confusion. (*See supra* p. 17.)  
 10 Accordingly, Plaintiffs have adequately pleaded that Alexander Defendants’ engaged  
 11 in unlawful and fraudulent acts in violation of the UCL, and thus the Court **DENIES**  
 12 Alexander Defendants’ MTD as to this claim.

### 13 *I. Claim 12: Misappropriation of Ideas*

14 Finally, the Court finds that Plaintiffs’ twelfth claim is preempted by the  
 15 Copyright Act of 1976 (“the Act”). “Preemption occurs when (1) the work at issue  
 16 comes within the subject matter of copyright and (2) the rights granted under state law  
 17 are ‘equivalent to any of the exclusive rights within the general scope of copyright’ set  
 18 forth in the Act.” *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1057 (C.D.  
 19 Cal. 2000) (quoting *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976  
 20 (9th Cir. 1987)).

21 First, because Plaintiffs’ ideas have been affixed in a tangible, copyrighted  
 22 work—the GACT footage—Plaintiffs’ twelfth claim falls within the scope of federal  
 23 copyright law. *See id.* at 1057–59. Second, the rights afforded by the Act are  
 24 equivalent because “Plaintiff[s]’ breach of implied contract claim falls squarely into the  
 25 category of contract claims that allege no additional rights other than promising not to  
 26 benefit from the plaintiff’s work.” *Id.* at 1062 (internal quotation marks, alteration, and  
 27 citations omitted). In other words, because Plaintiffs “allege an implied-in-fact contract  
 28 not to use [their] ideas and concepts . . . without compensating [them],” they do not

1 allege a contract that “protects or creates any rights not equivalent to the Act’s exclusive  
 2 prohibitions of unauthorized reproduction, performance, distribution, or display.” *Id.*  
 3 at 1062, 1060–61 (citation omitted). Accordingly, Plaintiffs’ twelfth claim is  
 4 preempted, and therefore this Court **GRANTS WITH PREJUDICE** Alexander  
 5 Defendants’ MTD as to this claim.

### 6 **CONCLUSION**

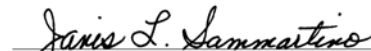
7 In light of the foregoing, the Court **GRANTS** Alexander Defendants’ Request  
 8 for Judicial Notice, **GRANTS** Plaintiffs’ Request for Judicial Notice, and **GRANTS**  
 9 **IN PART AND DENIES IN PART** Alexander Defendants’ Motion to Dismiss.

10 The Court **GRANTS** Alexander Defendants’ Motion to Dismiss **WITHOUT**  
 11 **PREJUDICE** as to claims 3, 4, 5, and 9. The Court **GRANTS** Alexander Defendants’  
 12 Motion to Dismiss **WITH PREJUDICE** as to claim 12, as amendment of this claim  
 13 would be futile. *See DeSoto*, 957 F.2d at 658. The Court **DENIES** Alexander  
 14 Defendants’ Motion to Dismiss as to claims 6, 7, 8, 10, and 11.

15 If Plaintiffs wish, they **SHALL FILE** an amended complaint within fourteen (14)  
 16 days of the date on which this Order is electronically docketed. *Failure to file an*  
 17 *amended complaint by this date may result in dismissal of Plaintiffs’ claims against*  
 18 *Alexander Defendants with prejudice.*

19 **IT IS SO ORDERED.**

20 DATED: April 25, 2014

21   
 22 Honorable Janis L. Sammartino  
 23 United States District Judge  
 24  
 25  
 26  
 27  
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